81-1735

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, et al.

On Appeal From The United States District Court For The Western District of Texas

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a public transit system is an example of a traditional operation performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services, which would entitle the transit system to immunity from Fair Labor Standards Act coverage.

2. Whether a transit system that has been converted from private to public ownership and has been the recipient of, and been dependent upon, substantial federal capital and operating grants pursuant to the Urban Mass Transportation Act, is entitled to Tenth Amendment immunity from Fair Labor Standards Act coverage on the ground that the services in question are those which the states have traditionally afforded their citizens and are services which state and local governments are created to provide.

3. Whether it is apparent that a public transit system's compliance with the Fair Labor Standards Act would impair the state's ability to structure integral operations in an area of traditional function.

PARTIES BELOW

The parties to the proceedings in the United States District Court for the Western District of Texas were: San Antonio Metropolitan Transit Authority, plaintiff; American Public Transit Association, plaintiff-intervenor; The Honorable Raymond J. Donovan, Secretary of Labor of the United States (who was substituted for F. Ray Marshall, the incumbent when the action commenced), defendant; and Joe G. Garcia, defendant-intervenor.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the Western District of Texas (App., 1a-3a) is not officially reported, but appears at 25 Wage and Hour Cases (PNA) 274.

JURISDICTION

The appellee, San Antonio Metropolitan Transit Authority, instituted a declaratory judgment action against the Secretary of Labor, alleging that the minimum wage and overtime provisions of the Fair Labor Standards Act could not constitutionally be enforced against appellee by virtue of the Tenth Amendment. Subject matter jurisdiction was founded on 28 U.S.C. §§ 1331 and 1337.

The judgment of the district court, declaring that the Secretary of Labor cannot apply or seek to enforce the Fair Labor Standards Act against appellee or any other local public mass transit system, was entered on November 17, 1981. The notice of appeal was filed with the clerk of the district court on December 16, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1252. *Donovan* v. *Richland County Assn.*, —— U.S. ——, 102 S. Ct. 713 (1981) (per curiam).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have the power . . . .
>
> • • •
>
> To regulate commerce . . . among the several States . . . .

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTORY PROVISIONS INVOLVED

Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*

§ 203 Definitions

As used in this chapter —

* * *

(d) "Employer" . . . includes a public agency . . .

* * *

(r) "Enterprise" means the related activities performed . . . for a common business purpose . . . . For purposes of this subsection, the activities performed by any person or persons —

* * *

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a state or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

§ 207. Maximum Hours

(a)(1) . . . no employer shall employ any of his employees who . . . is employed . . . for a workweek longer than forty hours unless such employee receives com-

pensation . . . at a rate not less than one and one-half times the regular rate at which he is employed.

• • •

Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1601 *et. seq.*

§ 1601. Declaration of findings and purpose

(a) The Congress finds —

• • •

(3) that Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems.

(b) The purposes of this chapter are —

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

• • •

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public and private mass transportation companies as determined by local needs.

§ 1601a. Additional declaration of findings and purpose

• • •

It is the purpose of this Act to create a partnership which permits the local community, through federal financial assistance, to exercise the initiative necessary to satisfy its urban mass transportation requirements.

• • •

§ 1601b. Additional declaration of funding

The Congress finds that —

• • •

(3) for many years the mass transportation industry satisfied the transportation needs of the urban areas of the country capably and profitably;

(4) in recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service;

(5) the termination of such service as the continued increase in its cost to the user is undesirable . . . .

• • •

(7) immediate substantial federal assistance is needed to enable many mass transportation systems to continue to provide vital service.

• • •

§ 1602. Federal financial assistance

• • •

Private transit operators

(e) No financial assistance shall be provided under this chapter to any State or local public body or agency thereof for the purpose, directly or indirectly, of acquiring any interest in, or purchasing any facilities or other property of, a private mass transportation company, or for the purpose of constructing, improving, or reconstructing any facilities or other property acquired (after July 9, 1964) from any such company, or for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless (1) the Secretary finds that such assistance is essential to the program of projects required by section 1607 of this title, (2) the

Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies, (3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws, and (4) the Secretary of Labor certifies that such assistance complies with the requirements of section 1609(c) of this title.

• • •

§ 1604. Urban Mass transit grant program

• • •

Limitation on amount of grants for construction and operating expense projects; source of remainder of funds for projects

(e) The Federal grant for any construction project under this section shall not exceed 80 per centum of the cost of the construction project, as determined under section 1603(a) of this title. The Federal grant for any project for the payment of subsidies for operating expenses shall not exceed 50 per centum of the cost of such operating expense project. The remainder shall be provided in cash, from sources other than Federal funds or revenues from the operation of public mass transportation systems. Any public or private transit system funds so provided shall be solely from undistributed cash surpluses, replacement or depreciation funds or reserves available in cash, or new capital.

• • •

§ 1609. Labor Standards

• • •

Interests of employees; protective arrangements; terms and conditions

(c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

STATEMENT OF THE CASE

Transit Operations in San Antonio

Appellee, San Antonio Metropolitan Transit Authority ("SAMTA"), a political subdivision of the State of Texas, commenced operations as a public transportation system on March 1, 1978.

Public ownership of transit in San Antonio actually began on May 1, 1959 when the City of San Antonio created the San Antonio Transit System ("SATS") and bought the San Antonio Transit Company, a private bus company.

During its first decade of operations, the SATS had been a money-making venture whose operations were governed by the terms of a revenue bondholders' indenture.[1] During this time the transit system was able to operate without any type of government subsidy.

However, as set forth in a statement prepared for delivery to the Subcommittee on Housing of the House Comm. on Banking and Currency, on March 10, 1970, F. Norman Hill, general manager of SATS, remarked that the system had recently experienced an operating loss for the first time in its history. Mr. Hill, who was speaking in support of H.R. 16261,[2] on behalf of the American Transit Associa-

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1. The National Bank of Commerce of San Antonio, acting as the bondholders' trustee, was the depository for all of the system's revenues and would release monthly operating funds to the system in accordance with the annual budget. As of March 1, 1978, when SAMTA assumed transit operations, the bonds were paid in full.

2. H.R. 16261 (see, 116 Cong. Rec. 5785 (1970)) was one of several bills introduced that session "to provide long-term financing for expanded urban mass transportation programs, and for other purposes" — wording that became the preamble to the Urban Mass Transportation Act of 1970, P.L. 91-453, which, in part, amended the Urban Mass Transportation Act of 1964, P.L. 88-365, 49 U.S.C. § 1601 *et. seq.*

tion, concluded that "[i]f we do not receive substantial help from the federal government, San Antonio may one day join the growing ranks of cities without public transportation."

Shortly after this prediction that its survival would depend on federal aid, SATS became the recipient of a capital grant by the Urban Mass Transit Administration in the amount of $4,122,666.[3] Over the next 10 years SAMTA and its predecessor, SATS, received $51,689,000 in federal capital and operational grants, accounting for approximately 40 percent of its total project costs of $130,922,194. And during its first two fiscal years, since its creation in March 1978, SAMTA has benefitted from $12,500,000 in federal funds.

Transit Operations in the U.S.

Mass transit operations in San Antonio are generally typical of the pattern in the nation. Traditionally, the transit industry in the United States has been operated by private companies. See, e.g., *Division 1447, Amalgamated Transit Union* v. *Louisville and Jefferson County Transit*, 659 F. 2d 722, 723 (6th Cir. 1981). At the time of the Second World War only 35 transit systems carrying 7% of transit riders, were publicly owned. AMERICAN PUBLIC TRANSIT ASSOCIATION, TRANSIT FACT BOOK 55 (1978-79 ed.). By December, 1960, the number of publicly owned systems increased slightly to 64. But 95% of the 1251 transit systems in the country remained privately owned.[4] While the San Antonio system, which had gone public the

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3. Project No. TX03005, approved December 23, 1970.

4. H.R. Rep. No. 204, 88th Cong., 1st Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 2569, 2590.

previous year, was ranked among the 5% of transit systems in the public realm, for more than a decade it continued to be operated profitably under the aegis of private bondholders.

In 1964 Congress enacted the Urban Mass Transportation Act (UMTA), P.L. 88-365, 78 Stat. 302, 49 U.S.C. § 1601 *et. seq.* Both the House and Senate were impressed by the need for improvements in passenger transportation in urban areas which posed a problem national in scope: "Mass transportation needs have outstripped the present resources of the cities and states, and a nationwide program can substantially assist in solving transportation problems." H.R. Rep. No. 204, 88th Cong., 1st Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 2569, 2573. Likewise the Senate Committee on Banking and Housing made the following observations in favorably reporting out the bill (S.6):

> THE FEDERAL RESPONSIBILITY
>
> The improvement of passenger transportation in urban areas is one of the major problems facing the country today. The need for Federal assistance has long been recognized . . . .
>
> • • •
>
> *Mass transportation needs have outstripped the present resources of the cities and States, and a nationwide program can substantially assist in solving transportation problems. The Federal Government cannot ignore these problems.* The continued economic vitality and growth of our urban areas is essential to our national welfare. Indeed, the welfare of all our citizens is directly dependent upon the commerce and industry of our cities.

> *There are, of course, a number of other reasons why this problem involves a considerable measure of Federal responsibility.*
>
> *For one thing, the problem of providing adequate urban mass transportation service has long ago spilled over the boundaries of many local political jurisdictions. In fact, it has spilled over a good many State boundaries.* Some 54 of our 200-odd metropolitan areas either border on or cross over State lines. The financial difficulties of the State and local governments are even more acute than the jurisdictional difficulties. Most of our cities are faced with rising service costs and declining tax bases.
>
> • • •
>
> It is for these reasons that the leadership and financial assistance of the Federal Government is needed now to encourage solutions that are forward looking and generally applicable to urban areas regardless of size.

(S. Rep. No. 82, 88th Cong,, 1st Sess., 12-14 (1963) ("S. Rep."); emphasis supplied).

Although "States and local public bodies and agencies thereof" are the only applicants who are eligible for federal assistance under UMTA (49 U.S.C. § 1602(a)(1)), Congress, when enacting this legislation, was well aware that transit in the United States was largely a function of private enterprise. Thus, Congress concurred in the 1962 transportation message from President Kennedy which stated that "[t]he program is not intended to foster public as distinguished from private mass transit operations."[5]

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5. S. Rep., p. 19. H.R. Rep. No. 204, 88th Cong., 1st Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 2567, 2581.

Congress recognized, nevertheless, that public acquisition of private mass transit systems should be an available option and made provision for this contingency in the Act:

> No financial assistance shall be provided under this Act to any State or local public body or agency thereof for the purpose, directly or indirectly, of acquiring any interest in, or purchasing any facilities or other property of a private mass transportation company, or for the purpose of constructing, improving, or reconstructing any facilities or other property acquired (after the date of the enactment of this Act) from any such company, or for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless (1) the Secretary finds that such assistance is essential to a program, proposed or under active preparation, for a unified or officially coordinated urban transportation system as part of the comprehensively planned development of the urban area, (2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies, (3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws, and (4) the Secretary of Labor certifies that such assistance complies with the requirements of section 13(c) of this Act.
>
> (49 U.S.C. § 1602(e)).

As originally enacted the federal commitment under UMTA was up to two-thirds of the "net project cost"[6] of a capital undertaking. Section 301(a) of the Federal-Aid

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6. "Net Project Cost" is defined as "the cost of a project . . . that cannot be reasonably financed from revenues." 49 U.S.C. § 1603(a).

Highway Act of 1973 (P.L. 93-87) raised the federal share from two thirds of the net project cost to 80 percent. H.R. Rep. No. 93-118, 93rd Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 1859, 1901-02. The National Mass Transportation Assistance Act of 1974 (P.L. 93-503) further amended UMTA by authorizing federal subsidies to defray 50% of operating deficits. (49 U.S.C. § 1604(e).)

During the period 1965 through September 30, 1979, nearly $12½ billion in capital grants alone were provided and between fiscal years 1975-1979 operating grants under UMTA exceeded $2.6 billion. These federal subsidies make manifest the Congressional declaration that "the purpose of this Act [is] to create a partnership which permits the local community through federal financial assistance, to exercise the initiative to satisfy its urban mass transportation requirements." 49 U.S.C. § 1601a.

The availability of these federal outlays under UMTA has proven to be the incentive that has accelerated public takeovers of transit systems.[7] "Faced with the possibility of unprofitable private transit systems ceasing operations and the incentive of federal government financial assistance, many municipalities adopted public ownership of their transit systems."

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7. D. Barnum, FROM PRIVATE TO PUBLIC: LABOR RELATIONS IN URBAN MASS TRANSIT (1977). ("Barnum"). According to a July 1979 study by The Department of Transportation there were 647 transit operations in urbanized areas (over 50,000 population) nearly evenly divided between public and private ownership: 320 privately owned and 327 publicly held. URBAN MASS TRANPORTATION ADMINISTRATION, A DIRECTORY OF REGULARLY SCHEDULED FIXED ROUTE LOCAL PUBLIC TRANSPORTATION SERVICE 17 (1979).

AMERICAN PUBLIC TRANSIT ASSOCIATION, TRANSIT FACT BOOK 56 (1978-79 ed.).[8]

The Fair Labor Standards Act

Historically, then, the transit industry in this country was an overwhelmingly private undertaking, and, as employers, these private transit operations were subject to the National Labor Relations Act and the Fair Labor Standards Act. *Amalgamated Ass'n. etc.* v. *Wisconsin Employment Rel. Bd.*, 340 U.S. 383 (1951); *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497 (1950).[9] In those jurisdictions where a transition from private to public ownership has occurred, comparative studies have not revealed marked

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8. A number of municipalities have, nonetheless, decided to contract the management and operation of their publicly owned systems to private management companies under what is known as the "Memphis formula." Barnum, *supra*, at 33; *See e.g., Division 1235, ATU* v. *Metro. Transit Auth.*, 650 F. 2d 1389, 1390 (6th Cir. 1981).

9. At the time of the enactment of UMTA, many state laws contained prohibitions against collective bargaining in the public sector. Mindful that conversion from the private to public realm could leave transit employees without any safeguards, Congress from the outset sought to impose federal labor standards on the transit industry as it evolved as a consequence of federal funding. This Congressional concern is manifested in Section 13(c) of UMTA, 49 U.S.C. § 1609(c), which provides in material part:

> It shall be a condition of any assistance . . . that fair and equitable arrangements are made . . . to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to . . . (1) the preservation of rights, privileges, and benefits . . . under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights . . . .

See, *Division 1285, ATU* v. *Jackson Transit Auth.*, 650 F. 2d 1379, 1387 (6th Cir. 1981), *cert. granted*, 50 USLW 3436 (No. 81-411).

differences in the structure of labor relations between the public and private realms. In 1977, Barnum reported:

> The statistical tests show that, between 1965 and 1971, public systems paid neither higher nor lower wages than their private counterparts. In addition, there was no consistent difference in wages whether the public system was owned by an independent authority or was part of the City Government; if the system was operated by its public owner or by contract with a private management company; and whether the system was newly public or had been so for a number of years. (Barnum, *supra,* 130-131.)[10]

Thus, on or about the effective date of the 1974 amendments to the Fair Labor Standards Act, extending the Act to a public agency like the San Antonio Transit System, the system issued the following "special notice":

> . . . San Antonio Transit System bus operators will be paid at the rate of time and one-half (1½) for all actual straight time hours worked in excess of 48 hours in a pay week. This does not apply to *regular operators* already receiving time and one-half (1½) on a daily basis for work performed in excess of his regular run, nor to regular and extra operators who qualify for and receive time and one-half (1½) for all work performed on their days of rest. * * *

On October 15, 1976, however, the system issued another "special notice" to the transit system's employees, discontinuing overtime pay except when due "in accordance with the Memorandum of Working Conditions for Hourly-Paid Employees." According to the transit system it no

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10. The Amalgamated Transit Union, which represents over 100,000 employees in the transit industry, including SAMTA's employees, has found, through its own research, that only a handful of operations in the country do not pay an overtime rate.

longer had to pay overtime at a time and one-half rate because, SATS alleged, in an allusion to the Court's decision in *National League of Cities* v. *Usery,* the Supreme Court had declared that the FLSA "does not apply to state and local government employees."

Proceedings Below

Thereafter, in response to a specific inquiry about the applicability of the FLSA to employees of SAMTA, the Wage and Hour Administration of the Department of Labor rendered an opinion "that the operations of the San Antonio Transit System are not constitutionally immune from the application of the Fair Labor Standards Act." (Opinion WH-499, dated September 17, 1979, *reprinted in* Wage Hour Manual (BNA) 91:1138-1140).

On November 21, 1979, SAMTA filed this action for declaratory judgment against the Secretary of Labor seeking a determination that SAMTA was exempt from the provisions of the FLSA.[11] On December 21, 1979, the Secretary of Labor amended Section 775.3(b) of the regulation (Code of Federal Regulations, Title 29, Part 775), to include "local mass transit systems" as one of a list of "functions of a State or its political subdivision [that] are not traditional." (44 Fed. Reg. 75628.)

SAMTA moved for summary judgment asserting that a public mass transit system performs "an integral operation

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11. On that same date appellent Joe C. Garcia, and fellow employees, had instituted an action in the district court against SAMTA for overtime pay under the FLSA. (*Garcia* v. *SAMTA,* SA 79 CA 458.) That suit was stayed pending disposition of the constitutional challenge herein. Garcia immediately sought to intervene here. His motion to intervene was granted just before the court's ruling on summary judgment.

in areas of traditional governmental functions" and by virtue of *National League of Cities* the FLSA "cannot be constitutionally applied to it." Alternatively, SAMTA argued that the decision in *National League of Cities* precludes enforcement of the FLSA against any state or local governmental body in the absence of a Congressional reenactment of a constitutionally valid amendment to that Act. The Secretary of Labor thereafter filed its motion for partial summary judgment, contravening both constitutional challenges raised by SAMTA. On November 17, 1981, the district court granted SAMTA's motion for summary judgment, finding that "local public mass transit systems (including San Antonio Metropolitan Transit Authority) constitute integral operations in areas of traditional functions . . . and that the Secretary of Labor of the United States cannot apply or seek to enforce the minimum wage and overtime pay provisions of the Fair Labor Standards Act. . . ."[12] Consequently, the Department of Labor's classification of a public mass transit system as not being an integral operation in an area of traditional governmental functions (29 CFR 775.3(b)(3)) was held to be "null and void." (App., 1a-3a).

On January 19, 1982, the district court ordered stayed pending appeal that portion of its judgment which enjoined the Secretary of Labor from applying or seeking to enforce the FLSA against all other public mass transit systems in the nation.

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12. The district court denied Intervenor Garcia's motion to stay summary judgment proceedings to give him a chance to take discovery, since he had just been allowed to intervene.

THE QUESTIONS ARE SUBSTANTIAL

A. The Issue Is One of National Importance.

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (herein *NLC*), the Court, for the first time in four decades, held a Congressional regulation of commerce to be an unconstitutional intrusion upon the sovereignty of state and local governments. The factors underlying the decision have been described as oblique. *Florida Dept. of Health* v. *Florida Nursing Home Ass'n*, —— U.S. ——, 101 S. Ct. 1032, 1036, n. 10 (Stevens, J., concurring).

There were eight specific activities[13] identified in *NLC* as being "within the area of traditional operations of state and local governments" for purposes of immunity from compliance with the FLSA. 426 U.S. at 851. In the six years since *NLC* was decided, the lower federal courts have been left to grapple with the rather abstract terms of the immunity principle — "integral operations in areas of traditional government functions" — formulated by this Court.[14] The tests employed by the lower courts admittedly have not been uniform. *Compare, Amersbach* v. *City of Cleveland*, 598 F. 2d 1033, 1037 (6th Cir. 1979), *with, Alewine* v. *City Council of Augusta*, 505 F. Supp. 880, 888-89 (S.D. Ga. 1981).

The decision below, extending the coverage of *NLC* to an industry that, by virtue of federal financing, is being trans-

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13. Fire protection, police protection, sanitation, public health, parks, recreation, schools and hospitals. 426 U.S. at 846-47, 851, 855. This listing was not deemed to be exhaustive. *Id.*, at 851, n. 16.

14. On remand, the district court noted that the opinion had left open "a gray area, which will require elucidation in the factual settings presented by future cases." *Nat'l League of Cities* v. *Marshall*, 429 F. Supp. 703, 706 (D.D.C. 1977); *See also, Fry* v. *U.S.*, 421 U.S. 542, 558 (1975) (Rehnquist, J., dissenting).

formed from privately to publicly owned enterprises throughout the country, extended *NLC* both too far and in the wrong direction.

The court below decided erroneously two very important issues left after *NLC*. First, the Court wrenched the standard of traditional activity in *NLC* from its moorings in history; second, the Court found determinative state sovereignty concerns in a program that is a product of private user financing and cooperative federalism and whose labor relations are largely governed by federal law. These holdings raise recurring and complex constitutional issues, which this Court alone can address definitively.[15]

Appeals by public transit employees are now pending in three circuits from district court decisions that they are not entitled to overtime pay under the FLSA: *Dove* v. *Chattanooga Area Regional Transportation Authority*, No. 1-80-249 (E.D. Tenn. July 21, 1981), *appeal docketed*, No. 81-5636 (6th Cir. September 30, 1981); *Kramer* v. *New Castle Area Transit Authority*, No. 80-1008G (W.D. Pa. June 11, 1981), *appeal docketed*, No. 81-2223 (3rd Cir. August 10, 1981); *Alewine* v. *City Council of Augusta, Georgia*, 505 F. Supp. 880 (S.D. Ga. 1981), *appeal docketed*, No. 81-7490 (11th Cir. June 5, 1981). A contrary holding, finding that a public transit line was not an integral operation in an area of traditional function was rendered by the district court in *Joiner* v. *City of Macon*, No. 79-287-MAC (M.D. Ga. April 27, 1981), *appeal docketed*, No. 81-7789 (11th Cir. September 30, 1981), *consolidated with*,

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15. During the course of oral argument in *United Transportation Union* v. *Long Island Railroad*, No. 80-1295, the Court was informed that this case was headed here.

Alewine, supra. Moreover, as these cases arise in an employment relations setting — with a potential impact on the livelihood of thousands of public transit employees — it is particularly important to resolve these issues in an area where there is a need for stability and consistency.

B. The District Court Deviated From NLC and the Post-NLC Decisions of This Court.

The district court entered judgment for SAMTA without any analysis of the unique historical and legal status of mass transit systems in this nation. The district court was content to parrot the *NLC* immunity standard and conclude that public mass transit systems constitute "integral operations in areas of traditional governmental functions", enjoining the Secretary of Labor from enforcement of the FLSA against any public transit system in the United States.

This rather perfunctory treatment of the issues controverts the Court's decision of just last term in *Hodel* v. *Virginia Surface Mining and Reclamation Ass'n.*, —— U.S. ——, 101 S. Ct. 2352 (1981), that a claim of Tenth Amendment immunity under *NLC* must be subjected to rigorous judicial scrutiny:

> [I]n order to succeed, a claim that Congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." *Id.* at 854. Second, the federal regulation must address matters that are *indisputably* attributes of state sovereignty. *Id.* at 845. And, third, it must be apparent that the States' compliance with the federal law would *directly impair* their ability to struc-

> ture *integral operations in areas of traditional functions.* (101 S. Ct. at 2366; emphasis in original and added.)

The restrictive gloss placed upon *NLC* by *Hodel* is manifest. The cloak of immunity is only available if the federal legislation, *inter alia,* "would directly impair [the States'] ability to structure integral operations in areas of traditional functions." This is a demanding standard of proof — "it must be apparent" — that the Court has imposed on a public body.

There is, however, nothing on the record which makes it "apparent" that SAMTA's payment of time and one-half for hours worked in excess of 40 per week would "directly impair [its] ability to structure integral operation in areas of traditional functions."[16] To the contrary, regarding impairment, the record reflects that for several years transit system employees in San Antonio were paid a premium rate for overtime without any apparent disruption of service. Not surprisingly, SAMTA contended that it was irrelevant whether compliance with the FLSA would impair its operations. However, *Hodel* is to the contrary.

Second, the record Garcia was able to elicit reflects that SAMTA and transit generally are more like proprietary enterprises than traditional sovereign prerogatives. Long privately owned and operated, even the publicly owned SATS was answerable to a trustee for the private bondholders, and SAMTA is still substantially financed by

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16. Appellant Garcia was forclosed by the district court from engaging in discovery. What little information it was able to garner about SAMTA's operation was elicited under the Texas public information statute.

fares. The decision here, ignoring the substantial evidence elicited and cutting off Garcia's discovery, cannot be reconciled with this Court's other pronouncements on the scope of *NLC*.[17]

The one activity the *NLC* Court described as not "an integral portion of those governmental services which the states and their political subdivisions have traditionally

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17. In this regard the Chief Justice's observations in his concurring opinion in *City of Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389, 423-424 (1978), are most pertinent:

> The *National League of Cities* opinion focused its delineation of the " 'attributes' of sovereignty" alluded to above on determination as to whether the State's interest involved "functions essential to separate and independent existence.' " *Ibid.*, quoting *Coyle* v. *Oklahoma*, 221 U.S. 559, 580, 31 S. Ct. 688, 695, 55 L. Ed. 853 (1911). *It should be evident, I would think, that the runnning of a business enterprise is not an integral operation in the area of traditional governmet functions.* See *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 695-696, 96 S. Ct. 1854, 1861-62, 48 L. Ed. 2d 301 (1976); *Bank of United States* v. *Planters' Bank of Georgia*, 9 Wheat. 904, 907, 6 L. Ed. 244 (1824). Indeed, the reaffirmance of the holding in *United States* v. *California, supra*, by *National League of Cities, supra*, 426 U.S., at 854 n. 18, 96 S. Ct., at 2475, strongly supports this understanding. Even if this proposition were not generally true, the particular undertaking at issue here — the supplying of electric service — has not traditionally been the prerogative of the State. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352-353, 95 S. Ct. 449, 454, 42 L. Ed. 2d 477 (1974). (Emphasis supplied.)
>
> Justice Rehnquist in dissent in *Fry* v. *U.S., supra*, likewise opined "that the traditional distinction between 'governmental' and 'proprietary' activities might in some form prove useful . . ." 421 U.S. at 558. Cf. *Cabell* v. *Chavez-Salido*, —— U.S. ——, 102 S. Ct. 735, 740 (1982) (distinction between the economic and political functions of government). *Ball* v. *James*, — U.S. —, 101 S. Ct. 1811 (1981). *See*, Tribe, *Unraveling National League of Cities*, 90 Har. L. Rev. 1065, 1076-7 (1977).

afforded their citizens," 426 U.S. at 855, was a public rail transportation line:

> The holding of *United States* v. *California*, as opposed to the language quoted in the text, is quite consistent with our holding today. There California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in "common carriage by rail in interstate commerce . . . ." 297 U.S., at 182, 56 S. Ct., at 423.
>
> For the same reasons, despite Mr. Justice BRENNAN's claims to the contrary, the holdings in *Parden* v. *Terminal R. Co.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964), and *California* v. *Taylor*, 353 U.S. 553, 77 S. Ct. 1037, 1 L. Ed. 2d 1034 (1957), are likewise unimpaired by our decision today.

(*Id.* at 854 n. 18).

In *Helvering* v. *Powers*, 293 U.S. 214 (1934), the Court had held that a local elevated railway system, supported by public funds, is a "nature" of "enterprise" that is "distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the states." 293 U.S. at 227. Thus, mass transit services have not traditionally been the province of the states or their political subdivisions. As outlined earlier, the provision of these services was relegated to the private sector.

Third, the recent public acquisitions of mass transit systems, as well as the survival of public transit operations like SAMTA, are beholden to the capital and operational assistance made available by the *federal* government under the Urban Mass Transportation Act. The only public tradition of mass transit service is that of a joint undertaking

between the federal and state governments: [T]he purpose of [UMTA is] *to create a partnership* which permits the local community, through Federal financial assistance, to exercise the initiative to satisfy its urban mass transportation requirements." 49 U.S.C. § 1601a. (Emphasis supplied.)

Consequently, the displacement of state sovereignty, a concern of the Court in *NLC*, is precluded by *the substantial federal interest in mass transit.* By virtue of this substantial federal involvement, local public mass transit constitutes a program of "cooperative federalism" and "[i]n this respect . . . resembles a number of other federal statutes that have survived Tenth Amendment challenges . . . ." *Hodel, supra* at 2366.

In sum, the decision here, applying the *NLC* holding to SAMTA, with no local public tradition, largely resembling a proprietary activity and involving a federal presence critical to such public involvement as exists, would extend *NLC* far beyond its necessary or desirable scope and skew the analysis of any other applications irretrievably.

CONCLUSION

For the reasons set forth above the Court should note probable jurisdiction.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,

Plaintiff,

and

AMERICAN PUBLIC TRANSIT ASSOCIATION,

Plaintiff-Intervenor,

v.

THE HONORABLE RAYMOND J. DONOVAN, SECRETARY OF LABOR OF THE UNITED STATES,

Defendant,

and

JOE G. GARCIA,

Defendant-Intervenor.

Civil Action No. SA 79 CA 457

JUDGMENT

This cause was heard by this Court on September 10, 1981, upon motions for summary judgment filed by San Antonio Metropolitan Transit Authority and American Public Transit Association and motions for partial summary judgment filed by the Secretary of Labor and Joe G. Garcia. The Court has carefully considered the motions, briefs, affidavits and other material on file in this cause and the arguments of counsel and finds that there is no genuine issue as to any material fact in this cause

and that the Plaintiff and Plaintiff-Intervenor are entitled to a judgment as a matter of law. The Court accordingly finds that the motions of San Antonio Metropolitan Transit Authority and American Public Transit Association for summary judgment should be granted and that the motions for partial summary judgment of the Secretary of Labor and Joe G. Garcia should be denied.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED.

1. That the motions for summary judgment of Plaintiff San Antonio Metropolitan Transit Authority and Plaintiff-Intervenor American Public Transit Association are hereby granted;

2. That local public mass transit systems (including San Antonio Metropolitan Transit Authority) constitute integral operations in areas of traditional governmental functions under the decision of the United States Supreme Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) and that the Secretary of Labor of the United States cannot apply or seek to enforce the minimum wage and overtime pay provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*, against local public mass transit systems in the United States, including San Antonio Metropolitan Transit Authority;

3. That the "Final Interpretation" issued by the Wage and Hour Division of the United States Department of Labor on December 21, 1979 (44 Federal Register 75628-75630) is null and void insofar as it lists local public mass transit systems as not being integral operations in areas

of traditional governmental functions under *National League of Cities* v. *Usery, supra;*

4. That the motions for partial summary judgment filed by the Secretary of Labor and Joe G. Garcia are hereby denied;

5. That the counterclaim filed by the Secretary of Labor on February 8, 1980 is hereby dismissed with prejudice; and

6. That the Defendant Secretary of Labor and Defendant-Intervenor Joe G. Garcia pay all costs incurred in this action by Plaintiff and Plaintiff-Intervenor.

SIGNED this 17th day of November, 1981.

FRED SHANNON,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *Plaintiff,* *and* AMERICAN PUBLIC TRANSIT ASSOCIATION, *Plaintiff-Intervenor,* v. THE HONORABLE RAYMOND J. DONOVAN, SECRETARY OF LABOR OF THE UNITED STATES, *Defendant,* *and* JOE G. GARCIA, *Defendant-Intervenor.*	Civil Action No. SA 79 CA 457

NOTICE OF APPEAL

Defendant-Intervenor, Joe G. Garcia appeals to the United States Supreme Court from the judgment in the

above-captioned case, dated November 17, 1981, pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101(a).

Respectfully submitted,

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Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOE G. GARCIA,

Appellant,

VS.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, et al.,

Appellee.

On Appeal From The United States District Court For The Western District of Texas

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SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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IN THE

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On Appeal From The United States District Court For The Western District of Texas

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SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

ARGUMENT

Appellant, Joe G. Garcia, files this Supplemental Brief to call this Court's attention to the impact on this case of this Court's decision in *United Transportation Union* v. *Long Island Railroad,* No. 81-1925, —— U.S. ——, 50 U.S.L.W. 4315 (4/24/82) and the ruling of the United States Court of Appeals for the Third Circuit in *Kramer, et al.* v. *New Castle Area Transit Authority,* No. 81-2223 (3rd Cir. 1982), issued since the filing of Appellant's Jurisdictional Statement.

As set forth in Appellant's Jurisdictional Statement (at 19), this case is one of five such cases pending in federal courts around the country. *Dove* v. *Chattanooga Area Regional Transit Authority,* Civ-1-80-249 (E.D. Tenn. July 21, 1981), *appeal pending,* No. 81-5636 (6th Cir.); *Kramer* v. *New Castle, supra, Alewine* v. *City of Augusta, Georgia,* 505 F. Supp. 880 (S.D. Ga. 1981), *appeal pending,* No. 81-7490 (11th Cir.) and *Joiner* v. *City of Macon,* No. 79-287-MAC (M.D. Ga., Apr. 27, 1981), *appeal pending,* No. 81-7789 (11th Cir.). These cases were all filed within months of the issuance of the Department of Labor interpretative regulation, 42 Fed. Reg. 32253 (1977), codified at 29 CFR 775.2(b), (d), and 775.3(b), where the Labor Department classified local mass transit systems as not within the immunity set forth by this court in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976).

Before any of the above listed cases could be decided, the United States Court of Appeals for the Second Circuit ruled in *United Transportation Union* that, under *National League of Cities* v. *Usery,* the Tenth Amendment to the U.S. Constitution precluded the application of the federal Railway Labor Act to the Long Island Railroad. *United*

Transportation Union v. *Long Island Railroad,* 634 F. 2d 19 (2nd Cir. 1980), *rev'd., United Transportation Union, supra.* Shortly thereafter, the federal district courts in *Dove, Alewine* and *Kramer,* ruled, largely on the strength of the Court of Appeals decision, that the Tenth Amendment immunity extended similarly to local mass transit.[1]

In the instant case, the Plaintiff, San Antonio Metropolitan Transit Authority ("SAMTA"), and Plaintiff-Intervenor, American Public Transit Association ("APTA"), similarly urged the district court that the decision of the Court of Appeals in *Transportation Union* was "remarkably applicable" to this case and squarely supported their position. (Supplemental Memorandum of American Public Transit Association in support of Plaintiff's Motion for Summary Judgment and in Reply to Defendant's Supplemental Memorandum, October 20, 1980, p. 5).[2] Thus, here, as in *Dove* and *Alewine,* the reversal of the Court of Appeals decision in *Transportation Union* completely undercuts the rationale for the holding.

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1. By contrast, without referring to *United Transportation Union,* the United States District Court for the Middle District of Georgia ruled in *Joiner* that the Tenth Amendment does not immunize the local mass transit system there from application of the F.L.S.A.

2. On October 21, 1980, SAMTA filed a memorandum to the district court in which it set forth the application of the nature and essentiality of local transit as a function of state or local government, asserting: "[This] is the only issue involved in the instant case, and the Second Circuit's decision, being squarely in point, is conclusively dispositive of that issue." (Plaintiff's Response to Supplemental Memorandum in Support of Defendant's Motion for Summary Judgment, p. 3). *See, also,* Memorandum Attaching the Second Circuit's decision of September 15, 1980 in *United Transportation Union* v. *Long Island Railroad Co.,* in Further Support of Plaintiff's Motion for Summary Judgment, filed in the district court on September 18, 1980.

Immediately after the issuance of this Court's decision in *Transportation Union,* the Court of Appeals for the Third Circuit ruled in *Kramer* reversing the district court and holding that: (1) transit services historically have been privately provided and subject to federal law; accordingly, under this Court's decision in *Transportation Union,* the state may not, by acquiring such services, insulate them from the application of federal law; (2) the transfer of mass transit services to public ownership was caused and fueled by federal funding; accordingly, transit, when public, is a joint federal-state undertaking and not a traditional state function at all.

As the Court of Appeals for the Third Circuit properly ruled in *Kramer,* this Court's holding in *Transportation Union* dictates reversal of the district court ruling here. First, the function and history of both the Long Island Railroad and local mass transit generally are so similar that *Transportation Union* would dictate the outcome here in any case. Both involve primarily the transportation of commuter passengers with an urban metropolitan area. Like the commuter train service of the Long Island Railroad, local transit systems were privately owned and operated for years.

Next, setting forth the general standard for invalidating federal law under a *National League of Cities* claim, this Court reiterated the ruling in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n., Inc.,* —— U.S. ——, 101 S. Ct. 2352 (1981), that:

> . . . it must be apparent that the States' compliance with the federal law would directly impair their ability "structure integral operations in areas of traditional functions." *Id.,* at 852. —— U.S. ——, 50 U.S.L.W., at 4317.

This Court then held that this "key" (*Id.*) third prong of the *National League of Cities* standard required a finding that "the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" *Id.* at 4318. This Court clarified that test immediately by holding that the Tenth Amendment did not require "a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation." *Id.*

Under this standard, as the Third Circuit just held, the local transit industry does not quality for Tenth Amendment immunity from the Fair Labor Standards Act. Throughout most of its history, transit has been provided by private companies. In 1960, 95% of transit was privately owned and operated. H.R. Rep. No. 204, 88th Cong., 2nd Sess., *reprinted in,* U.S. Code Cong. & Ad. News, 2569, 2590. Not until 1967 were even half of all transit riders patronizing publicly owned systems. American Public Transit Authority, Transit Fact Book, 1981, page 27.[3]

In 1961, when 95% of the 1251 transit systems in the country were privately owned, Congress extended the minimum wage laws to private mass transit operations. Public

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3. The Chattanooga Area Regional Transportation Authority, at issue in *Dove,* began to provide formerly private transit services in 1973. *Dove, supra,* slip op. at 2. Augusta, Georgia, similarly did not take over the privately provided transit operations in Augusta until 1973, *Alewine, supra,* 505 F. Supp. at 884; nor did the City of Macon act to purchase the Macon transit system until 1973. *Macon, supra,* slip op. at 2. In San Antonio, the San Antonio Transit System operated under a trust indenture for the benefit of bond holders until the creation of SAMTA in 1978.

Law 87-30, § 2(s)(2), 75 Stat. 65 (1961). In 1966, overtime protections of the FLSA were added to the protections of employees of private employers and both minimum wage and overtime protections were extended to employees of public transit authorities as well. Public Law number 89-601, § 102(a)(2), (b), 80 Stat. 830 (1966), excepting only overtime for operating employees. In 1974, Congress phased out the overtime exemption for operating employees. Public Law No. 93-259, § 21(b) (1) – (3), 88 Stat. 55 (1974).

Moreover, transit services were never a part of the tradition of state government. To the contrary, the states' assumption of transit services out of the private sphere has been overwhelmingly accomplished through the vehicle of federal funding. Thus, the creation of SAMTA, like the creation of CARTA and the city transit system in Augusta, Georgia, were all accompanied by the immediate influx of the large scale federal funding under the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.*[4] In CARTA and Augusta, the federal funds were used to buy out the system. *Dove, supra,* slip op. at 2; *Alewine, supra,* 505 F. Supp., at 884. In San Antonio, the operators of the San Antonio Transit System threatened to close it down unless large scale federal funding was made available to them.

Overall, as the Cohn Affidavit in the record here reflects, from 1967 through 1979, 80% of the public takeovers of private transit in systems where the Amalgamated Transit Union represents employees were financed with direct federal takeover grants. Even in the 20% of other public operations, all, save one, were dependent upon the imme-

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4. Macon, Georgia, used federal revenue sharing money. (Slip op. at 3).

diate influx of federal capital assistance to create a viable system. As Appellant Garcia set forth in his Jurisdictional Statement, as a reflection of that state/federal partnership, § 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c), imposes an obligation to continue collective bargaining after a public takeover. The preservation of federal labor relations has meant that, through collective bargaining, the overwhelming majority of mass transportation systems already afforded operators overtime pay, even if they would not have been covered by the overtime provisions of the Federal Fair Labor Standards Act prior to the public takeover. Accordingly, as in *Transportation Union*, the states embarked upon the local mass transit enterprise knowing that the substance of federal labor relations was to continue into the public sphere.

Under these circumstances, like the Long Island Railroad, local transit service generally has a long history of federal regulation in the private sphere. Accordingly, to apply Tenth Amendment immunity now would violate the core of this Court's ruling in *Transportation Union* — that states may not withdraw subjects of traditional federal regulation wholesale, into *National League of Cities* immunity. Second, as the Third Circuit pointed out, local transit never even passed into a local public tradition, much less to the status of a function essential to the survival of the sovereign state, because it passed out of the private sphere into a partnership between federal and local providers. Accordingly, the obligation to comply with the Fair Labor Standards Act in local transit service does not remotely displace the states' sovereign role as *Transportation Union* requires.

CONCLUSION

In conclusion, the district court decision is both in error and in conflict with the decision of the Third Circuit in *Kramer*, and plenary consideration is warranted here.

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On Appeal From The United States District Court For The Western District of Texas

APPENDIX TO APPELLANT'S SUPPLEMENTAL BRIEF SETTING FORTH DECISION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN *KRAMER, ET AL. v. NEW CASTLE AREA TRANSIT AUTHORITY*

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2223

ROBERT M. KRAMER, LUTHER A. MILLER, DONALD PETTITT, HOWARD N. BARNES, DAVID R. SHAW, GERALD J. MAGGIE, ERNEST ORELLI, PHILLIPS C. REED, JAMES W. BURNS, G. MAXINE PARDICK, MARTHA E. KEITH, JAMES L. RAMSEY, CLYDE W. REED, RALPH L. JONES, PHILLIPS W. REED, JOHN P. CARSON, ROBERT C. BURNWICK, DAVID C. MATTHEWS, WALTER R. SLACK, WILLIAM L. HANNA, LOUIS V. PAGLIARO, and all other plaintiffs similarly situated,

Appellants,

v.

NEW CASTLE AREA TRANSIT AUTHORITY
(D.C. Civil No. 80-1008)

On Appeal From the United States District Court for the Western District of Pennsylvania

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Argued: February 4, 1982
Before: GIBBONS, WEIS and GARTH, *Circuit Judges*
(Opinion Filed: April 30, 1982)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

Twenty-one plaintiffs, employed as bus operators by the New Castle Area Transit Authority (the Authority), appeal from the grant of summary judgment in favor of the defendant in their suit for overtime pay under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (FLSA). The Authority is a political subdivision of the Commonwealth of Pennsylvania, and the district court dismissed the complaint in reliance on *National League of Cities* v. *Usery,* 426 U.S. 833 (1976). We reverse.

In *National League of Cities* v. *Usery,* the Court held that the tenth amendment prevented the application of the overtime pay provisions of FLSA to employees of states and their political subdivisions who were engaged in traditional governmental functions. *Id.* at 855. A nonexclusive list of such traditional functions included police protection, sanitation, public health, parks and recreation, hospitals, and schools. The *National League of Cities* case afforded little guidance, however, as to the identification of traditional functions. More recently we have been afforded clarification. In *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.,* 452 U.S. 264, 287-88 (1981), the Court announced a three part test for evaluating whether a commerce clause regulation contravenes the tenth amendment:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged regulation regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States'

> compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental function." (Citations omitted).

That test was reiterated in *United Transportation Union* v. *LIRR*, 50 U.S.L.W. 4315, 4317 (March 23, 1982). We assume, as did the district court, that the first two requirements of this conjunctive test are satisfied, and concentrate, as did the Court in *United Transportation Union*, on the third. In that case the Court emphasized that while "emphasis on traditional governmental functions and traditional state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation." 50 U.S.L.W. at 4318, the historical reality of the activity in question could not be ignored. States are not free to assume functions historically performed by the private sector and thereby insulate those activities from federal regulation of interstate commerce.

Local mass transit systems have historically been owned and operated by private companies. Some public operation started in the early part of this century — Seattle (1911), San Francisco (1912), Detroit (1921), and New York (1932) — yet as late as 1960, 95% of transit companies in the nation were privately owned and operated. H.R. Rep. No. 204, 88th Cong., 2d Sess., *reprinted in*, [1964] U.S. Code Cong. & Ad. News, 2569, 2590. In 1964, Congress passed the Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat. 302, *codified at* 49 U.S.C. §§ 1601, *et seq.*, (UMTA) in recognition of the difficulties experienced by the private mass transit industry. The principal purpose of the Act was to "provide [federal] assistance to State and local governments and their instrumentalities in financing . . . [transportation] systems, to be operated

by public or private mass transportation companies as determined by local needs." 49 U.S.C. § 1601(b)(3).

The UMTA put inexorable forces in motion whereby, at an accelerated pace, transportation companies changed hands from the private sector to the public sector. By 1978, local publicly owned transit systems received 90% of the revenues from all transit operation; accounted for 91% of total vehicle miles operated and 91% of all linked passenger trips; and owned or leased 87% of total transit vehicles. (Scheuer Affidavit — App. 20a). Nonetheless, between 45 and 52% of all transit operations (counting each system, irrespective of size, as one unit) were privately owned. U.S. Dep't of Transportation, Urban Mass Transportation Administration, *A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service,* 6 (1980); U.S. Dep't of Transportation, Urban Mass Transportation Administration, *A Directory of Regularily Scheduled, Fixed Route, Local Public Transportation Service,* 17 (1979); Scheuer Affidavit (App. 20a). The federal government is actively involved in local mass transportation. It provides: (1) capital grants, funded on a "80% federal/20% local" matching basis; (2) operating grants, on a "50% federal/50% local" matching basis; and (3) technical assistance to state and local planning agencies on an "80% federal/20% local" matching basis.

We think that the state involvement in local transit systems, increasing with more systems coming under state control in recent years, does not alter the "historical reality" that the operation of mass transit systems "is not among the functions *traditionally* performed by state and local governments." *Cf. United Transportation Union* v. *LIRR,* 50 U.S.L.W. 4315, 4317 (March 23, 1982) (same conclusion reached with respect to commuter railroads). The whole move away from private transit systems and

into public systems was started and effected by the federal government which provided the financial support to allow the changeover to public transportation companies. Moreover, the federal government has, through the matching funds programs, maintained an intimate involvement with the operation of such public systems. The result has been a network of public run systems which are cooperations between the federal government and the states. The tradition that has evolved encompasses not only state involvement in local mass transportation but also an important federal role in the matter. The Authority cannot recast this development as one in which the states took over transit services on their own while the federal government only provided *post hoc* financial assistance. Massive state involvement with mass transit was created by the national government and the states are precluded from claiming, at this late date, that mass transit is a service which they traditionally provide. Tradition must be gauged in light of what actually happened, and what happened is a federal program of local transit service in which the states participate as late comer junior partners. There is, therefore, no tradition of the states *qua* states providing mass transportation.[1] Moreover, since it is undisputed that

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1. Defendant contends that, since private local transportation companies are doomed to extinction, state involvement is necessary and inescapable: that state provision of these services is the new "reality." We do not agree. Defendant's argument, as a logical construct, only goes to the determination of the "public vs. private" nature of local mass transit, it does not go to the "state vs. federal" nature of governmental involvement. What the defendant, at best, shows is that government must shoulder the burden abandoned by the private sector. This does not answer the federalism issue before us, i.e., whether local transportation services are traditional *state* functions immunized from federal regulation by the tenth amendment.

the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in this area. *See generally, United Transportation Union, supra,* 50 U.S.L.W. at 4318.

Judge Garth, concurring, prefers to rest his decision upon language in *United Transportation Union, supra,* to the effect that before federal regulatory legislation violates the tenth amendment it must have the effect of endangering a state's separate and independent existence, and hampering its ability to fulfill its role in the Union. While we do not disagree with his observation that such a federal regulatory scheme is almost inconceivable, and recognize that *National League of Cities* may in fact have been overruled, we prefer to decide this case on the narrower grounds discussed above, leaving to another day consideration of the full reach of the *United Transportation Union* case.

The judgment appealed from is reversed and the case remanded to the district court for further proceedings not inconsistent with this opinion.

GARTH, J., concurring.

While unquestionably the history and operation of the New Castle Area Transit Authority differs from the history and operation of the Long Island Railroad, the Supreme Court's analysis in *United Transportation Union* v. *Long Island Railroad,* 50 U.S.L.W. 4315 (1982) clearly indicates that the Authority is subject to the provisions of the Fair Labor Standards Act. Even though the Authority, a state

instrumentality, has operated the bus system which is the subject of this action since 1958, in terms of *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981) and *LIRR, supra*, it is apparent that the Authority is not providing a service which has "traditionally" been performed by state governments.

I prefer resting my decision in this case on the ultimate, and I think more definitive, test announced in *LIRR*. In my opinion, the crucial standard by which the Authority's immunity from FLSA must be measured is, do "the federal regulations affect basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the union and endanger its 'separate and independent existence.'" 50 U.S.L.W. 4318.

Chief Justice Burger writing for the majority in *LIRR*, held that the application of the Railway Labor Act to New York's operation of the Long Island Rail Road, would not have the effect of endangering New York's "separate and independent existence" as a state. In so holding, it appears to me that the Supreme Court has now virtually restricted the rule of *National League of Cities*, 426 U.S. 833 (1976) to the particular and peculiar facts of that case. I find it almost impossible to hypothesize very many other circumstances in which federal regulations would endanger the separate and independent existence of a state.[1] Thus, it seems to me that while different conclu-

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1. In New York v. United States, 326 U.S. 572 (1945), the Supreme Court held that the State of New York could be taxed by the federal government on the sale of mineral waters taken from Saratoga Springs and therefore New York was not immune from taxation under § 615(a)(5) of the 1939 Internal Revenue Act which imposed a tax on mineral waters.

(Footnote continued on next page)

sions, each of which may be valid in its own right, might be reached as to whether a particular state function is a *"traditional"* function, there can be little dispute in my opinion, as to whether a state's very existence will be endangered by a particular federal Statute or Regulation. In effect therefore, the "endangering" test announced by the Court, whatever its wisdom, appears to me to have the undeniable virtue of being more certain in application than the "traditional function" test. By being more certain in application, it will undoubtedly have the effect of forestalling disputes of the type presented by the instant case.

Having been instructed that subjecting the Long Island Rail Road to the Railway Labor Act would not threaten the "separate and independent existence" of New York as a state, I can hardly maintain otherwise with respect to the application of the FLSA to the operation of the New Castle Area Transit Authority. Thus, tested by the standard of "endangering a state's separate and independent existence," I agree with Judge Gibbons that the order of the district court granting summary judgment for the Authority, must be reversed.

(Footnote continued from preceding page)

Chief Justice Stone in his concurring opinion stated:

But in view of our former decisions we could hardly say that a general non-discriminatory real estate tax (apportioned), or an income tax laid upon citizens and States alike could be constitutionally applied to the State's capital, its State-house, its public school houses, public parks, or its revenues from taxes or school lands, even though all real property and all income of the citizen is taxed.

* * *

Only when and because the subject of taxation is State property or a State activity must we consider whether such a non-discriminatory tax unduly interferes with the performance of the State's functions of government. If it does, then the fact that the tax is non-discriminatory does not save it.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

The Chief Justice qualified his opinion by quoting from Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523-24:

> But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it. Metcalf & Eddy v. Mitchell, supra, 523-24.

No. 81-1735

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOE G. GARCIA,

Appellant,

vs.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY AND AMERICAN PUBLIC TRANSIT ASSOCIATION,

Appellees.

REPLY BRIEF IN RESPONSE TO THE MOTIONS TO AFFIRM OF THE SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY AND AMERICAN PUBLIC TRANSIT ASSOCIATION AND IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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REPLY BRIEF IN RESPONSE TO THE MOTIONS TO AFFIRM OF THE SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY AND AMERICAN PUBLIC TRANSIT ASSOCIATION AND IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

I.

INTRODUCTION

Appellees, San Antonio Metropolitan Transit Authority (hereinafter, "SAMTA") and American Public Transit Association (hereinafter, "APTA"), have filed separate Motions to Affirm. There, they contend that this case is appropriate for summary disposition by this Court. (SAMTA Motion, at 1; APTA Motion, at 1). In light of this Court's recent decision in *United Transportation Union* v. *Long Island Rail Road*, —— U.S. ——, 50 U.S.L.W. 4315 (Apr. 24, 1982) (No. 81-1925) (hereinafter, *"Transportation Union"*), wherein this Court refused to extend its decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), to bar application of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, to a commuter transportation system, and in light of the conflict with the federal courts resulting from the Third Circuit's decision in *Kramer* v. *New Castle Area Transit Authority*, —— F. 2d ——, No. 2223 (3rd Cir. Apr. 30, 1982) (hereinafter, *"Kramer"*), on the very same issue before this Court, Appellees' contention

that this case is appropriate for summary disposition has no merit. As the length and content of their motions demonstrate, Appellees have presented arguments on the merits, which, in and of themselves, show the need for this Court's plenary review.[1] Accordingly, Appellant will limit himself to the issue which this Court must now decide: whether summary affirmance of the district court's decision could possibly be appropriate in view of the issue of national importance presented here, the recent decision of this Court in *Transportation Union* and the Court of Appeals in *Kramer*, and the strength of Appellant's position on the merits.

II.

ARGUMENT

This case comes on direct appeal from the ruling of the United States District Court for the Western District of Texas holding unconstitutional and enjoining enforcement of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ((hereinafter, "FLSA"), as it applies to employees of publicly owned mass transit systems. At the instance of Appellee APTA, the district court restrained Appellant Secretary of Labor Donovan from such enforcement anywhere in the United States (Appendix, 2a); accordingly, the question before this Court is not merely the Tenth Amendment immunity for the San Antonio Metropolitan Transit Authority, but for all mass transit. Thus, the national importance of the questions presented on appeal is obvious.

A.

The Ruling on Appeal Conflicts With the Decision of the Only Circuit to Rule on the FLSA's Application to Mass Transit.

Immediately after this Court unanimously reversed the ruling in *Transportation Union*, the United States Court

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1. Appellees' Motions to Affirm total some 58 pages. In the ten pages allotted for this Reply Brief, Appellant cannot respond fully to Appellees' argument on the merits, nor their presentation of the facts, including "facts" which appear nowhere in the record of this case. See, *infra* at 7, n. 9, and SAMTA Motion, at 4, n. 4.

of Appeals for the Third Circuit unanimously reversed the district court decision in *Kramer*, on the strength, *inter alia*, of *Transportation Union*.[2] Thus, the decision here is in direct conflict with the ruling of the only court of appeals to rule on the subject so far.[3] Three other cases are pending before courts of appeals, *Alewine* v. *City Council of Augusta*, 505 F. Supp. 880 (S.D. Ga. 1981), *appeal docketed*, No. 81-7490 (11th Cir. June 5, 1981); *Joiner* v. *City of Macon*, No. 79-287-MAC (M.D. Ga. April 27, 1981), *appeal docketed*, No. 81-7789 (11th Cir. September 30, 1981), *consolidated with, Alewine, supra; Dove* v. *Chattanooga Area Regional Transportation Authority*, No. 1-80-249 (E.D. Tenn. July 21, 1981), *appeal docketed*, No. 81-5636 (6th Cir. Sept. 30, 1981).[4]

Certainly, at the very least, this Court's reversal of the Second Circuit's ruling in *Transportation Union*, the conflict with *Kramer*, and the pendency of further conflicting litigation in two other Circuits warrant full briefing and oral argument on the merits here.

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2. In seeking this Court's summary affirmance, without briefs on the merits or oral argument, of the district court's nullification of this federal statute, neither Appellee addresses the Third Circuit's application of *Transportation Union* in *Kramer* and its application here. Indeed, Appellees barely acknowledge the existence of *Kramer*, the most recent and only appellate decision directly on point, each burying *Kramer* in a footnote purporting to describe the state of the precedent as "a majority of courts" favoring Appellees' position on the merits. (SAMTA Motion, at 4; APTA Motion at 15, n. 25). Appellees' disingenuous efforts to hide *Kramer* serve only to emphasize the inappropriateness of the issue for the summary action Appellees propose..

3. As set forth in Appellant Garcia's Supplemental Brief in Support of Jurisdictional Statement (hereinafter, "Supp. Br."), at 2, 3, the decision here and the other lower court opinions are inextricably intertwined with the now reversed decision of the Court of Appeals in *Transportation Union*, 634 F. 2d 19 (2nd Cir. 1980).

4. Just recently, the Appellant City of Macon filed a brief with the United States Court of Appeals for the Eleventh Circuit in *Joiner* acknowledging that this Court's ruling here might well dispose of *Joiner*.

B.

Appellees' Proposed Construction of *Transportion Union* Cannot Serve As A Basis for Summary Affirmance.

In *Transportation Union*, this Court held that, before application of a federal regulation may be struck down as directly impairing the state's ability to structure integral operations in areas of traditional governmental functions, *National League of Cities* "require[s] an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely *to hamper the state government's ability to fulfill its role in the Union* and *endanger its 'separate and independent existence.'* [*National League of Cities*, 426 U.S.], at 851." —— U.S., at ——, 50 U.S.L.W., at 4318. (emphasis added).

Appellees contend that the only question here is whether the function is traditional; accordingly, their motions are addressed solely to the question of traditionality.[5] (SAMTA Motion, at 9; APTA Motion, at 9). In *National League of Cities*, this Court ruled that the FLSA amendments are unconstitutional only "*insofar as they operate to directly displace* the states' freedom to structure integral operations in areas of traditional governmental functions," *National League of Cities, supra*, 426 U.S., at 852 (emphasis added).

Thereafter, this Court ruled in *Transportation Union* that the federal Railway Labor Act, addressing, as does the FLSA, state public employee labor relations, did not meet this standard. Accordingly, Appellees' argument, which would restrict the relevant inquiry here, cannot stand, must less support summary action by this Court.

Nor is *Transportation Union* distinguishable on the other grounds suggested by Appellees. For example, Appellees

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5. Appellees also completely ignore the difficult issue of the first prong of the *National League of Cities* test, as set forth in *Transportation Union*—the "states as states." *Cf., Community Communication Co. v. City of Boulder, Colo.*, —— U.S. ——, 102 S. Ct. 835 (1982).

assert that this Court's holding in *Transportation Union* is limited to railroads and merely represents a reaffirmation of this Court's preservation of the exemption for railroads in *United States* v. *California*, 297 U.S. 175 (1936), affirmed in *National League of Cities, supra*, 426 U.S., at 854 (SAMTA Motion, at 13; APTA Motion, at 26). This Court explicitly disclaimed such a limitation in *Transportation Union:*

> In concluding that the operation of a passenger railroad is not among those governmental functions generally immune from federal regulation under *National League of Cities*, we are not merely following dicta of that decision . . . —— U.S., at ——, 50 U.S.L.W., at 4317.[6]

This Court also specifically rejected Appellees' contention that *Transportation Union* rests on this Court's understanding of the Long Island Rail Road (hereinafter, "LIRR") as part of the interstate railroad system, in contrast to the local commuter transit sysem at issue here. (APTA Motion, at 27-28; SAMTA Motion, at 17, esp. n. 14). To the contrary, this Court ruled:

> The Court of Appeals undertook to distinguish the three railroad cases discussed in *National League of Cities*, noting that they dealt with freight carriers rather than primarily passenger railroads such as the Long Island. That distinction does not warrant a different result, however. Operation of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not state or local governments. —— U.S., at ——, 50 U.S.L.W., at 4317.[7]

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6. In *Transportation Union*, APTA urged this Court to limit any reversal to an application of *United States* v. *California*. (APTA Amicus Br., at 6). However, as noted here, this Court explicitly refused to so limit its ruling.

7. In *Transportation Union*, APTA characterized the LIRR as having a "*de minimis* connection with interstate freight railroads"

(Footnote continued on next page)

Appellees further contend that, unlike the LIRR's conversion to public operation, the conversion of mass transit to public ownership is somehow distinguishable, allowing mass transit, but not the LIRR's commuter operations, to be considered traditional state functions.

In *Transportation Union*, this Court looked to "the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments", concluding, accordingly, that "federal regulation of state-owned railroads simply does not impair a State's ability to function as a State." —— U.S., at ——, 50 U.S.L.W., at 4317. This Court continued that, although it was not looking *only* to the past to determine constitutionality, the history of the undertaking in question plays a critical role in the inquiry "whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence'." *Id.*, at 4317-18. This Court applied its test to conclude that where a function was historically provided by the private sector and, accordingly, subject to federal law, "there is *no justification for a rule which would allow the States, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation.*" *Id.*, at 4318 (emphasis added).

As set forth in Appellant's Suplemental Brief, the Congress first applied provisions of the FLSA to mass transit

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(Footnote continued from preceding page)

(APTA Amicus Br., at 6), being simply one "means selected by the state to perform [local public mass transit] service." (*Id.*). There, *amicus* APTA urged this Court, if it reversed *Transportation Union*, to make clear that its reversal rested on the narrow identity of the LIRR as a freight carrier in order to avoid "sweeping" local mass transit into the *Transportation Union* decision. (*Id.*) However, as noted, this Court declined Amicus APTA's suggestion to limits its reversal to freight railroads.

in 1961.[8] (Supp. Br., at 5-6). At that time, 95% of transit operations were private. (*Id.*). In 1967, a year after Congress applied overtime provisions of the FLSA to transit operations—public and private—90% of transit operations were still private. *APTA Transit Fact Book,* 1978-79.

In an effort to counter the statistics in the record of this case, which were published by APTA itself, APTA presents here for the first time statistics based on a new formulation of how the public nature of transit in past years should be measured: APTA takes the few cities with public transit and compares their population with the population of all cities of the same size. (APTA Motion, at 11, n. 14).[9] Even APTA's new measure cannot cover up the overwhelmingly private nature of mass transit in the past. For example, in 1932, APTA claims that 33% of the residents of cities with a population of or exceeding 250,000 were served by publicly owned transit. (APTA Motion, at 11). Yet APTA's own statistical sources reveal that the number of residents residing in cities served by publicly owned mass transit was less than 8% of the poulation of the United States at this time.[10] *Statistical Abstract of the United States* (hereinafter, "SAUS") Tables 9, at 10-12, Table 10 at 13, (66th ed. 1945-46). Even limiting the inquiry to

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8. Since at least 1937, transit labor relations had been subject to substantial federal regulation. Appellees do not dispute that private transit systems were subject since the 1930's to the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* which guaranteed transit workers collective bargaining or that Congress in enacting § 13(c) of the Urban Mass Transportation Act, 29 U.S.C. § 1609(c) intended to preserve the federal collective bargaining rights of transit employees.

9. APTA, which periodically publishes substantial statistical data regarding transit, including the public or private nature of § 13(c) of the Urban Mass Transportation Act, 29 U.S.C. § 1609(c), as a meaningful gauge of the public or private makeup of transit. *Compare,* APTA Transit Fact Book, 1978-9, at 38, 39.

10. Indeed, there is no evidence on record that any cities with populations under 250,000 had publicly owned mass transit before 1959. (APTA Br., at 11, n. 15.)

APTA's self-selected measure of cities of 250,000 or more, in 1932 only 4 of the 37 cities in the United States with a population of or exceeding 250,000 had publicly owned mass transit.[11]

Finally, Appellees fail entirely to dispose of the critical involvement of the federal government as a partner from the outset in the large scale public provision of transit services through the vehicle of the federal Urban Mass Transportation Act, 49 U.S.C. § 1601 *et seq.* (hereinafter "UMTA").[12]

To cite just examples from the record here: (1) after the farebox revenue ceased providing San Antonio with sufficient funds to operate its transit system, the first public subsidies for transit in San Antonio came not from the state or locality, but from the federal government under UMTA (Garcia Jurisdictional Statement, at 8, 9); and (2) the costly commitments to the elderly and handicapped SAMTA outlines as being evidence of its local sovereign obligations (SAMTA Motion, at 6) are actually requirements of the federal transit spending laws, 49 U.S.C. § 1604(m).

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11. In 1960, when APTA maintains that 48% of residents of cities with a population over 250,000 had publicly owned transit, only ten of 51 cities in the United States with a population of 250,000 or more were served by publicly owned mass transit. SAUS, Table 10 at 15, Table 14, at 19, 20 (86th Ed. 1965). And in 1964, when Congress enacted the Urban Mass Transportation Act, 49 U.S.C. § 1601, *et seq.*, providing massive federal funding for mass transit, still only 16 of the 51 cities with a population of 250,000 or more had publicly owned mass transit. *Id.* This example of how APTA distorted the statistical record here only illustrates the necessity for plenary review here.

12. APTA's own source, *The History of Public Works in the United States,* 1970-1976 (1976) at 178, published by the American Public Works Association highlights the *critical federal role in mass transit*: "The unwillingness or inability of most state and local governments to take effective action eventually made the search for solutions the *responsibility of the federal government.*" (emphasis added).

Moreover, APTA certainly cannot avoid *Transportation Union* because the current administration has proposed reducing the federal commitment to mass transit. (APTA, Motion, at 18, n. 33). Not only has Congress failed to pass this proposal, which APTA apparently seeks to have this Court enact as a matter of Constitutional adjudication, the proposal itself reflects the overwhelmingly federal nature of public transit as it now stands, and has stood since the passage of UMTA in 1964.

C.

National League of Cities Does Not Preclude All Applications of the FLSA.

In the alternative, Appellees contend that, despite the broad severability clause of the FLSA, 29 U.S.C. § 219, absent Congressional enactment of a constitutionally valid amendment, application of the FLSA to mass transit is impermissible following *National League of Cities*. (SAMTA Motion, at 25-28, APTA Motion, at 28, 29). Generally, this Court does not resolve issues on which the lower courts have never ruled or which are not raised by an Appellant's jurisdictional statement, *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376, 386, n. 12, and the presentation of such issues is "regard[ed] with disfavor." *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 363, 371-72, n. 4. Certainly, on summary disposition, ruling on an issue neither decided by the district nor raised in the jurisdictional statement would be inappropriate. Neither *Fusari* v. *Steinberg*, 419 U.S. 379, (1975), nor *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406 (1977), cited by SAMTA (SAMTA Motion, at 25, n. 25), hold otherwise.[13]

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13. Even if this Court were to consider this issue, Appellees' contention, in the face of the FLSA's broad severability clause, 29 U.S.C. § 219, has no merit. First, well-established doctrines of *res judicata* and collateral estoppel preclude Appellees, who were fully represented in *National League of Cities*, from contending here that *National League of Cities* entirely forecloses enforcement of the

(Footnote continued on next page)

III.

CONCLUSION

For the reasons set forth herein, this Court should note probable jurisdiction.

Respectfully submitted,

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FLSA against non-traditional government functions on grounds of non-severability. *National League of Cities* v. *Marshall,* 429 F. Supp. 703, 705 (D.C.D.C. 1977) (3 Judge Court) (on remand, upholding the severability clause and rejecting the Plaintiffs' position that, as a result of the Supreme Court's decision, the FLSA was inapplicable to all state and local government employees).

Second, Appellees' own cases stand for the proposition that where a severability clause exists, there is a presumption in favor of severability. *Carter* v. *Carter Coal Co.,* 298 U.S. 238, 312 (1936), *United States* v. *Jackson,* 390 U.S. 570, 585, n. 27 (1968). Here, Appellees have not overcome that presumption.

Third, since Congress enacted FLSA coverage of mass transit in 1961 and public transit employees in 1966 (Supp. Br., at 5, 6), Appellees' contention that Congress would not have intended coverage of transit to survive a ruling striking down some of the coverage of 1974 FLSA amendments is plainly wrong.